

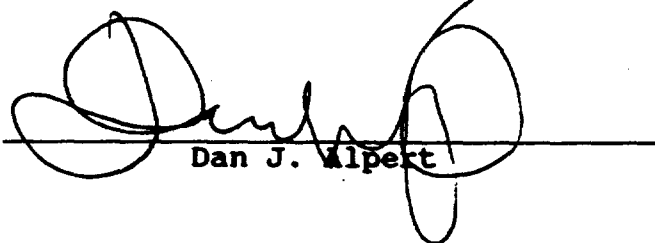
CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that a true and correct copy of the foregoing documents has been served by First Class Mail to the following persons:

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Dan J. Alpert

Federal Communications Commission
Docket No. 93-165 Exhibit No. FOUR
Presented by MASS MEDIA BUREAU

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| Disposition | { | Identified | <u>✓</u> |
| | | Received | <u>✓</u> |
| | | Rejected | <u> </u> |

Reporter M.K. FLEISHMAN
Date 10/26/93

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MASS MEDIA BUREAU Ex 4

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In re Application of

RICHARD P. BOTT, II

Assignor

and

WESTERN COMMUNICATIONS, INC.

Assignee

For Assignment of the Construction
Permit of Unbuilt Station KCVI(FM)
Blackfoot, Idaho

File No. BAPH-920917GO

RECEIVED

NOV 10 1992

Federal Communications Commission
Office of the Secretary

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

Richard P. Bott, II, permittee of unbuilt Station KCVI(FM), Blackfoot, Idaho, herein opposes the Petition to Deny filed by Radio Representatives, Inc. ("RRI") with respect to the above-captioned application. In opposition, the following is stated:

BACKGROUND

More than seven years ago, on July 11, 1985, Mr. Bott filed an application for a new FM station in Blackfoot, Idaho. Two years later, Mr. Bott's application and six others were designated for comparative hearing. Hearing Designation Order, 2 FCC Rcd 3897 (released July 1, 1987). A one-day hearing, involving the three then-remaining applicants was held December 2, 1987. An Initial Decision followed a year thereafter. 3 FCC Rcd 7094 (ALJ Luton,

released Dec. 12, 1988). The ALJ granted Mr. Bott's application. The Review Board thereafter affirmed the grant. Decision, 4 FCC Rcd 4930 (released June 5, 1989). The Commission subsequently denied an Application for Review which RRI filed. Order, 5 FCC Rcd 2508 (released April 12, 1990). RRI took an appeal to the United States Court of Appeals for the District of Columbia Circuit. The Court filed a judgment denying RRI's appeal on February 22, 1991.^{1/} Nearly nineteen months later, the above-captioned assignment application was filed.

As demonstrated herein, no basis for denial of the assignment application exists. Mr. Bott, throughout the six-year ordeal to obtain the construction permit, maintained in good faith his intention to move to Blackfoot and operate the proposed radio station. That intention changed when circumstances arising only after the Court affirmed the grant made clear the window of

^{1/} RRI did not challenge Bott's integration proposal in its appeal. It did, however, file on February 7, 1991, a "Motion for Remand to Reopen the Record," in which it challenged Bott's integration on the basis of an initial decision in another proceeding to which Mr. Bott's father, not Mr. Bott, was a party. Mr. Bott filed an opposition on February 19, 1992. The Court denied RRI's motion in an Order filed February 22, 1991, the same day the Court filed its judgment denying RRI's appeal.

Additionally, it should be noted with respect to the initial decision RRI relies upon (Raymond J. and Jean-Marie Strong, 6 FCC Rcd 553 (ALJ 1991), exceptions were filed with the Review Board. The Board, without substantive discussion of the exceptions of Mr. Bott, Sr., remanded the case. Raymond J. Strong and Jean-Marie Strong, 6 FCC Rcd 5321 (Rev. Bd. 1991). Following remand, Mr. Bott, Sr.'s application was dismissed pursuant to a settlement agreement. Memorandum Opinion and Order, FCC 91M-3428 (released December 12, 1991).

opportunity had closed for establishment of the type of radio station Mr. Bott had decided to operate -- a commercial station with a religious format.

As detailed in Mr. Bott's attached Declaration, several months after the Court's judgment was entered, and while Mr. Bott was in the process of making arrangements regarding the Blackfoot station, he learned that a station in the nearby community of Chubbuck, Idaho, had adopted a religious programming format essentially identical to that which he had hoped to implement.

This development dramatically changed the situation in the market. The Chubbuck station had a tremendous head start. Mr. Bott knew that it would be many months before he could get his station on the air. He also knew the market was too small and the economy too soft to support two commercial religious stations.

In light of this significant change in circumstances, Mr. Bott, although he had expended tens of thousands of dollars and some six years in an effort to obtain the Blackfoot permit, eventually reached the conclusion that he should accept an offer he received to assign the permit. It is important to note Mr. Bott will not profit by assignment of the KCVI construction permit. He simply will recoup the expenses he legitimately and prudently incurred in obtaining that construction permit.

Stated directly and simply, Mr. Bott's decision to assign the station's construction permit was engendered by circumstances that arose months after grant of the construction permit was final. Mr.

Bott advanced his integration proposal in good faith and without guile. Mr. Bott in no way has perpetrated a fraud upon the Commission or, for that matter, the Court of Appeals. RRI has presented no evidence to support its unfounded and hysterical allegations.

**RRI LACKS STANDING AND
ITS PETITION IS DEFICIENT**

RRI has not alleged any basis on which it has standing to submit a petition to deny. Nothing indicates that any RRI principal has become a resident of the Blackfoot station's anticipated service area, or that the Blackfoot station would cause interference to any RRI station. Furthermore, RRI's status as a former applicant for the Blackfoot allotment does not confer standing to challenge the above-captioned assignment application. E.g., WCTW, Inc., 26 FCC 2d 268, 269 n.2 (1970); accord, e.g., McClatchy Newspapers, 73 FCC 2d 171, 173 (1979) (mere applicant does not have standing to challenge application); Norman A. Thomas, 53 FCC 2d 646 (1975) (same).

Furthermore, and more importantly, RRI has failed to satisfy the bedrock requirement of Section 309 of the Communications Act that allegations "be supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. §309(d)(1). RRI has presented no affidavit in support of its allegation that Mr. Bott has committed a fraud upon the Commission and the Court. Under the circumstances, RRI's petition should be summarily dismissed.

**RRI'S RELIANCE ON SECTION
73.3597(a) OF THE RULES IS MISPLACED**

RRI argues in its petition that Section 73.3597(a) of the Commission's Rules compels designation of this application for hearing. It cites specifically Section 73.3597(a)(1), which provides that an application for assignment will be designated for hearing if the station involved "has been operated by the current licensee or permittee for less than one year," unless the FCC is able to find, inter alia, that "(1) The permit or license was not authorized . . . after a comparative hearing"

Of course, RRI fails to quote subparagraph (4) of the rule which provides that designation for hearing is not required if the FCC is able to find:

The assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that, due to unavailability of capital, the death or disability of station principals, or to other changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, FCC consent to the proposed assignment or transfer of control will serve the public interest, convenience and necessity.

47 C.F.R. §73.3597(a)(4) (emphasis added).

Here, as Mr. Bott's Declaration demonstrates, significant changed circumstances affecting his proposed construction and operation of the Blackfoot station occurred subsequent to the acquisition of the permit. Furthermore, grant of the assignment

application will serve the public interest in that it will lead to the prompt initiation of service on the allotment by the assignee.

Furthermore, the Commission has ruled explicitly that Section 73.3597(a) is applicable "solely to operational stations, not to unbuilt stations." Eagle 22, Limited, 7 FCC Rcd 5295, 5297 (1992), citing, TV-8, Inc., 2 FCC Rcd 1218, 1220 (1987).^{2/} The assignment of an unbuilt station such as KCVI is subject only to the provisions of Section 73.3597(c)-(d), which limits the consideration for sale of an unbuilt station to the legitimate and prudent expenses incurred in "preparing, filing and advocating the grant of the construction permit for the station and for other steps reasonably necessary toward placing the station in operation." 47 C.F.R. §73.3597(c)(2). Here, through an amendment filed October 14, 1992, Mr. Bott demonstrated compliance with Section 73.3597(c)-(d).

**GRANT OF THE ASSIGNMENT APPLICATION DOES NO VIOLENCE
TO THE INTEGRITY OF THE COMMISSION'S LICENSING PROCESSES**

To reiterate, circumstances arising months after the Court of Appeals affirmed grant of his construction permit led to his decision to assign the station. Mr. Bott will gain no profit from the transaction, but merely will recover the expenses incurred. Obviously, no motivation exists for an applicant to go through a

^{2/} In support of its argument that Section 73.3597(a) is applicable, RRI cites TV-8, Inc. In fact, that case explicitly holds that the hearing requirement of Section 73.3597(a) does not apply to an unbuilt station. 2 FCC Rcd at 1220.

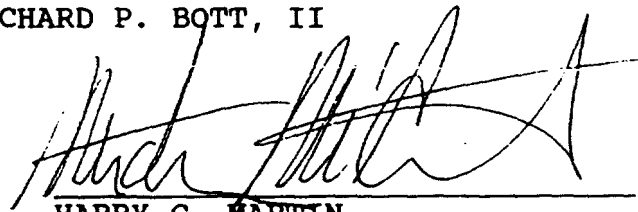
six-year licensing process, including adjudications before an Administrative Law Judge, the Review Board, the Commission itself, and the Court of Appeals, simply to recoup, without interest, the funds he previously expended. There will be no rush on the part of speculators to go through the ordeal Mr. Bott has. The fact Mr. Bott's window of opportunity closed after grant of his construction permit should not result in Mr. Bott being penalized the entire amount of his investment in obtaining the construction permit. Similarly, the public interest would be ill-served by denying the assignment application and thus delaying initiation of service on the frequency. The assignee is fully qualified to construct and operate the station. It should be permitted to do so.

WHEREFORE, the Petition to Deny filed by Radio Representatives, Inc. should be DISMISSED or DENIED IN ALL RESPECTS.

Respectfully submitted,

RICHARD P. BOTT, II

By



HARRY C. MARTIN
MATTHEW H. MCCORMICK

Its Counsel

Reddy, Begley & Martin
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Washington, D.C. 20037

November 10, 1992

DECLARATION
OF
RICHARD P. BOTT, II

(Original submitted with Opposition
to Petition to Reopen the Record)

STATEMENT OF RICHARD P. BOTT, II

In 1985 I decided that it would be good for me to build my own radio stations and go into business for myself. In July, 1985 I filed an application for a new FM frequency in Central Valley, California and an application for a new FM frequency in Blackfoot, Idaho. I selected Blackfoot, Idaho after studying the market as a broadcast market, and studying the competitive situation in the area.

When both applications became designated for hearing at approximately the same time in the summer of 1987, I realized that I then needed to decide where I was going to live and make my home. It was then that I decided to move to Blackfoot and personally run that station.

In September 1987 I traveled to Blackfoot. I met with community leaders, and I looked at available homes and studio space that a real estate agent had picked out for me.

Over the next several years I was disappointed with how long it was taking for this application to go through the comparative hearing process, but it remained my intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when I received the C.P. Throughout this time, I have rented an apartment in Kansas City rather than buy a house, in anticipation of moving to Blackfoot.

In April of 1990, the FCC finally granted the Blackfoot Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the

station with a religious format. All of my previous years of radio experience had involved religious format stations.

As the overall economy had worsened, I knew I could still successfully operate the station and serve the community with a religious format. I had contacts with potential clients, and there was an opening in the market for that format.

On September 25, 1991, I learned that that opening had just closed. On that day I visited the office of Maranatha Advertising in Costa Mesa, California. Its main client is the Word For Today broadcast from Calvary Chapel Church. In a conversation I had with the media buyer, Teresa Rivera, I learned that the church had just purchased a new FM radio station in Pocatello, Idaho that would serve much the same market area I was proposing to serve with my proposed station from Blackfoot. She told me the church was going to increase the station's power and would use a format very similar to the one I was planning to use, featuring many of the same clients I was planning to sell time to.

Upon further investigation I learned that she was correct. The station, KRSS, which is actually licensed to Chubbuck, was acquired by the church in the fall of 1991, and is operated as a commercial religious station. I confirmed that KRSS was going to carry many of the same religious programs I had hoped to put on my station.

For me this dramatically changed the competitive situation in the market. The church had a tremendous head start. I knew it would be many months before I could get my station on the air. I also knew that the market was too small and the economy too "soft" to support 2 commercial religious stations. I felt I had lost a good market opportunity because of the nearly 6 year delay involved in the comparative hearing process.

Throughout the remainder of 1991 and into 1992, I proceeded with planning for construction of the station while I explored the options available to me.

In January 1992, I requested and received an updated site management plan from the BLM. On January 10, 1992 I requested, and later received new call letters from the FCC. I spoke to the president of the Users Group at the transmitter site. I consulted with my engineer and equipment supplier concerning technical aspects of the construction and the necessary equipment. I contacted Mr. Kent Frandsen to proceed with my plans to install my antenna on his tower. Over the course of several conversations, Mr. Frandsen suggested to me that, if anticipated changes in the FCC duopoly law were adopted, he would like to buy my C.P. At first, I told him it wasn't for sale. But upon further reflection, I thought that with the change in the local competitive situation with the format I knew best, and with the poor overall state of the economy, a station with a duopoly operation and its inherent efficiencies and economies probably represents the best hope for a successful operation.

I consulted with my attorney and he told me that FCC law permitted me to sell my C.P. for the expenses I had into it at that point. I then decided that was the best thing to do, and contacted Mr. Frandsen to make arrangements to sell the C.P. to his company, Western Communications, for my expenses.

I declare under penalty of perjury that the foregoing is true and correct.

11/9/92

Date

Richard P. Frandsen

Signature

CERTIFICATE OF SERVICE

I, Marilyn L. Phillips, hereby certify that on this 10th day of November, 1992, copies of the foregoing **OPPOSITION TO PETITION TO DENY** were hand delivered or mailed, first class, postage prepaid, to the following:

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MARILYN L. PHILLIPS

* Hand Delivered